No. 09-1530

In the
Supreme Court of the United States

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 1776,
Petitioner,

v.

RITE AID OF PENNSYLVANIA, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

In this case, the Third Circuit held that a federal district court can review the merits of a grievance brought under a broad arbitration clause of an existing collective bargaining agreement when determining whether that grievance is arbitrable, even though that result is directly contrary to fifty years of this Court's precedent. Respondent opposes the Petition by misstating Petitioner's contentions to this Court, and by ignoring this Court's recent decision in *Granite Rock v. International Brotherhood of Teamsters*, 561 U.S. ___, 2010 U.S. LEXIS 5255 (June 24, 2010).

A. Respondent Misstates The Issue for Review

The central question raised by the instant Petition is *the process* by which a court faced with an arbitrability dispute determines whether the subject matter of the grievance is encompassed by the arbitration clause. Contrary to Respondent's contentions, Petitioner has not "ignored" the "precepts" set forth by this Court in *AT & T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643 (1986), because Petitioner did not restate the Court's rule that a court, and not an arbitrator, is the proper entity to resolve questions of arbitrability. *See* Respondent's Brief in Opposition ("BIO") at 7-8. Indeed, Petitioner has never disputed that it is the federal court's job to determine whether grievances arising under a collective bargaining agreement ("CBA") are arbitrable.

Rather, the issue is *how* the court below resolved that question – *i.e.*, by undertaking a detailed review

of the merits of the grievances, and deciding arbitrability with reference to the court's evaluation of the merits. Contrary to Respondent's claim, the Union is *not* arguing that "'we grieved, ergo we arbitrate.'" BIO at 6-7.

Instead, the Petition contends that the court below should have followed the *method* this Court described in *AT&T Technologies* – *i.e.*, applying a presumption of arbitrability "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute," *without regard* to the "potential merits of the underlying" grievance. 475 U.S. at 649-50. Thus, as Justice Brennan observed in *AT&T Technologies*, the arbitrability question to be determined by a court is "'strictly confined,' . . . to whether the parties agreed to submit disputes over the meaning of [the disputed contractual clause] to arbitration." 475 U.S. at 654 (Brennan, J., concurring) (citation omitted).

In view of *AT&T Technologies*, the only question the court below should have asked was whether it could say, "with positive assurance," that the arbitration clause excluded disputes concerning the contractual provisions cited by the Union from consideration by an arbitrator. Instead of making that inquiry, both the District Court and the Third Circuit engaged in a detailed analysis of the contractual provisions relied on by the Union in support of its greivances, and concluded that the Union's arguments were without merit.

In so doing, the Third Circuit has essentially "flipped" the legal presumption that grievances which facially assert a violation of a collective bargaining

agreement ("CBA") are arbitrable, *see United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564, 568 (1960), with one requiring unions to demonstrate that its grievance is arguable, if not non-frivolous. Such a result is plainly at odds with this Court's holding in *American Manufacturing*: "The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious. . . . When the judiciary undertakes to determine the merits of a grievance under the guise of interpreting the grievance procedure of a collective bargaining agreement, it usurps a function which under that regime is entrusted to the arbitration tribunal." 363 U.S. at 568-69.

Nothing this Court said in *Litton Financial Printing Division v. National Labor Relations Board*, 501 U.S. 190 (1991), or its progeny, has indicated that the rules first enunciated in *American Manufacturing* are overruled when interpreting arbitration agreements contained in existing collective bargaining agreements. Accordingly, the Petition should be granted in order to harmonize the Court's decisions in *AT&T Technologies* and *Litton Financial Printing*.

B. Precedent Decided Subsequent to this Petition Supports Review

This Court issued its decision in *Granite Rock* on June 24, some three weeks before Respondent filed the BIO. Nevertheless, Respondent avoids citing or discussing *Granite Rock*, or its impact on this case, even though the Court in that case decided it was necessary to "reemphasize the proper framework for

deciding when disputes are arbitrable under our precedents." 2010 U.S. LEXIS at *20.

In *Granite Rock*, this Court reiterated that: "a court may order arbitration of a particular dispute only where the court is satisfied that the parties agreed to arbitrate *that dispute*." *Id.* (emphasis in original). The federal courts "discharge this duty by: (1) applying the presumption of arbitrability only where a validly formed and enforceable agreement is ambiguous about whether it covers the dispute at hand; and (2) adhering to the presumption [of arbitrability] and ordering arbitration only where the presumption is not rebutted." *Id.* at *27-28.

Applying this test, the Third Circuit should have ordered arbitration of the Union's grievances. First, there is no question but the parties have a "validly formed and enforceable agreement to arbitrate." Further, that agreement, which specifically permits arbitration of grievances "involving the interpretation of any provision of this agreement" is a broad one, App. A. 8a, 25a, and plainly covers the Union's grievance which is based on the Union's interpretation of three specific provisions of the contract, App. A., 9a (Article 2.1 of CBA); 12a (Article 5.1 of CBA) and 13a (Article 15.3 of CBA). *See Granite Rock*, 2010 U.S. LEXIS at *33 ("the CBA's arbitration clause, which pertains only to disputes 'arising under' the CBA and thus presupposes the CBA's existence, would seem to plainly to cover a dispute that 'arises under' a specific substantive provision of the CBA").

As the foregoing demonstrates, *Granite Rock* restated and refined *AT&T Technologies'* test for determining how a court is to resolve a challenge to

the substantive arbitrability of a grievance. The Court did not, however, in any way modify the presumption governing the arbitrability of grievances arising out of an existing CBA with an undisputedly broad arbitration clause: such grievances are deemed arbitrable, without an inquiry into the merits of the grievance. Indeed, although the Court determined that an alternative argument was not properly preserved, Justice Sotomayor correctly observed in dissent that "this Court has been emphatic that 'courts . . . have no business weighing the merits of the grievance'" when determining arbitrability. *Granite Rock*, 2010 U.S. LEXIS at *56 (Sotomayor, J., dissenting) (*citing American Manufacturing*, 363 U.S. at 568).

C. The Court Should Grant, Vacate and Remand the Matter in Light of *Granite Rock*

The Third Circuit did not have the benefit of *Granite Rock's* refinement of the *AT&T Technologies'* test when it issued its decision below. As a result, instead of applying the presumption of arbitrability to determine whether Rite Aid and the Union "agreed to arbitrate *th[e] dispute*," 2010 U.S. LEXIS at *20, over whether Rite Aid's conduct had violated specified provisions of the CBA, the court below improperly placed the burden of proving arbitrability on the Union. Accordingly, Petitioner should have the opportunity to present this dispute to the Third Circuit, utilizing the further guidance provided by this Court in *Granite Rock*. Under these circumstances, the Court should grant the petition for a writ of certiorari, vacate the court of appeal's judgment, and

remand for further consideration (GVR) in light of *Granite Rock*.

CONCLUSION

For the foregoing reasons, and those stated in the petition for a writ of certoriari, the petition for a writ of certiorari should be granted and the case should be set for full briefing and argument. In the alternative, the petition for a writ of certoriari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded for further consideration in light of *Granite Rock Co. v International Brotherhood of Teamsters*, 561 U.S. ___, 2010 U.S. LEXIS 5255 (June 24, 2010).

Respectfully submitted,

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